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No. 03-9659

Supreme Court, U.S.
FILED
SEP - 2 2004
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IN THE

Supreme Court of the United States

THOMAS JOE MILLER-EL,

Petitioner,

v.

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the court of appeals—in reinstating on remand from this Court its prior rejection of petitioner's claim that the prosecution had purposefully excluded African-Americans from his capital jury in violation of *Batson* v. *Kentucky*, 476 U.S. 79 (1986)—so contravened this Court's decision and analysis of the evidence in *Miller-El* v. *Cockrell*, 537 U.S. 322 (2003) ("*Miller-El I*"), that it nullified the protections against invidious discrimination set forth in *Batson* and *Miller-El I* and the safeguards against arbitrary fact-finding set forth in 28 U.S.C. § 2254(d)(2) and (e)(1).

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OPINIONS BELOW

The opinion of the court of appeals (JA 1-20) is reported at 361 F.3d 849. This Court's previous opinion (JA 21-64), reversing and remanding the case to the Fifth Circuit, is reported at 537 U.S. 322. The earlier opinion of the court of appeals denying a COA (JA 993-1007) is reported at 261 F.3d 445. The opinion of the district court (JA 987-992) and the findings and recommendations of the magistrate judge that it adopts (JA 946-986) are unreported. The opinion of the Texas Court of Criminal Appeals abating petitioner's appeal and remanding it to the trial court (JA 885-889) is reported at 748 S.W.2d 459. The state trial court's findings of fact and conclusions of law after abatement of the appeal (JA 924-929) and the second opinion of the Texas Court of Criminal Appeals (JA 930-945) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 25, 2004. The petition for certiorari was filed on April 1, 2004 and granted on June 28, 2004. The Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sections 2254(d) and (e)(1) of Title 28, United States Code, provide:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

INTRODUCTION

Despite overwhelming evidence of racial discrimination in the selection of petitioner's jury, strong indications that the state courts mishandled that evidence, and this Court's reversal of the court of appeals' prior ruling with detailed instructions on how to assess the evidence properly, the court of appeals on remand nonetheless found again that petitioner's claim under *Batson* v. *Kentucky* was insufficiently established. It did so largely by ignoring this Court's direction.

This Court has already summarized the powerful evidence showing that the prosecutors at petitioner's 1986 trial used their peremptory challenges to exclude African-Americans from the jury: They were trained in an office culture "suffused with bias against African-Americans in jury selection." JA 41. They used two deliberately deceptive methods to question almost all of the African-American venire members in order to create bases for striking them from the panel, while employing different and straightforward methods of questioning most white venire members. JA 38-40. One of the prosecutors was found guilty of racial discrimination in another case tried at the same time as petitioner's, based on exactly the same racially disparate questioning used here. JA 40. The prosecutors' use of so-called "jury shuffles" to re-arrange the order of the venire whenever African-Americans appeared likely to serve on petitioner's jury "raise[s] a suspicion that the State sought to exclude African-Americans from the jury" (*id.*), and neither the State nor the court of appeals has ever offered an alternative explanation that would prevent that suspicion from ripening into a confident belief. And "three of the State's proffered race-neutral rationales for striking African-American jurors pertained just as well to some white jurors who were not challenged and who did serve on the jury." JA 37.

Moreover, as this Court also explained, the signs that the state courts failed to assess that evidence properly—and so were not entitled to the deference normally accorded on federal habeas review—were equally clear cut. The state trial court made its assessments of the prosecutors' credibility two years after the trial, thus leaving its conclusions "subject to the usual risks of imprecision and distortion from the passage of time." JA 37. That court concluded that petitioner had not even established a prima facie case of race discrimination, a conclusion this Court called a "clear error" and the State disavowed. JA 42. And the state courts "made no mention" at all of two of the four clusters of evidence of racial discrimination that petitioner presented and this Court addressed. *Id.*

Yet on remand the court of appeals—which had denied even a certificate of appealability to petitioner on its initial review of the matter—again concluded that the prosecutors

had not violated *Batson*. In the process, it deferred to precisely the same defective state-court determinations that this Court had identified as suspect. Given this Court's recitation of the powerful evidence of discrimination and the weaknesses in the state courts' analysis, the ruling below stands as a disturbing signal that conclusory findings by state courts, no matter how implausible, can deny the promise of *Batson* and federal habeas review, and that at least some federal courts are prepared to avert their eyes from even the clearest examples of racial bias. Only by condemning the blatant discrimination apparent in this record can this Court assure that the teaching of *Batson* and the Court's careful, specific illustration of that teaching in *Miller-El I* remain clear and compelling.

STATEMENT OF THE CASE

1. In 1986 petitioner Thomas Joe Miller-El, an African-American, was convicted of capital murder and sentenced to death by a jury from which the prosecutors had peremptorily struck 10 of the 11 African-Americans qualified to serve. *See* JA 23, 26.

After the completion of voir dire for jury selection, petitioner moved to strike the jury due to purposeful racial discrimination in its selection. He relied upon the then-controlling precedent of *Swain* v. *Alabama*, 380 U.S. 202 (1965), which required petitioner to show that the "prosecution's conduct was part of a larger pattern of discrimination aimed at excluding African-Americans from jury service." JA 23. Under *Swain*, discrimination in this case was not at issue. At the *Swain* hearing, "petitioner presented extensive evidence" of a pattern and practice of discrimination by the Dallas County, Texas, District Attorney's ("D.A.") office. *Id.* The trial judge concluded, however, that while racial discrimination in jury selection "'may have been done by individual prosecutors in individual cases[,]'" there was no evidence that indicated a "'systematic exclusion of blacks as a matter of policy by the District Attorney's office[.]'" *Id.* (internal citation omitted). He therefore denied the motion to

to strike, and petitioner was tried, found guilty, and sentenced to death.

2. While petitioner's appeal was pending, this Court decided *Batson* v. *Kentucky*, 476 U.S. 79 (1986), and in so doing "established its three-part process for evaluating claims that a prosecutor used peremptory challenges in violation of the Equal Protection Clause." JA 23. "First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race[; s]econd, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question[; and t]hird, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination." JA 23-24 (internal citations omitted).

The Texas Court of Criminal Appeals "acknowledg[ed that] petitioner had established an inference of purposeful discrimination" under step one of *Batson*, and it remanded to the trial court for a *Batson* hearing. JA 24. At this post-trial hearing, which took place "a little over two years after petitioner's jury had been empaneled," the trial court admitted all of the evidence submitted at the *Swain* hearing as well as additional evidence and testimony. *Id.*

Despite the Texas Court of Criminal Appeals' finding that petitioner had made out a prima facie case of discrimination as required under *Batson* step one, the trial court concluded that petitioner's evidence failed to "'even raise an inference of racial motivation in the use of the state's peremptory challenges.'" JA 24 (internal citations omitted). The trial court also concluded that the State would have prevailed at steps two and three in any event, because the prosecutors "had offered credible, race-neutral explanations" for each of the 10 African-Americans excluded. *Id.* The court "found 'no disparate prosecutorial examination of any of the veniremen in question,'" and found "'that the primary reasons for the exercise'" of the peremptory challenges against the African-American veniremen in question was "'their reluctance to assess or reservations concerning the imposition of the death penalty.'" *Id.* (internal citation omit-

ted). As this Court observed, "[t]here was no discussion of petitioner's other evidence." *Id.* The Texas Court of Criminal Appeals denied petitioner's appeal, and this Court denied certiorari. *Miller-El* v. *Texas*, 510 U.S. 831 (1993).

3. After unsuccessfully pursuing state habeas relief, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. §§ 2241 and 2254, raising several claims, including a claim that the prosecutors had selected his capital jury in violation of *Batson*. Although the federal magistrate judge who considered the merits of the *Batson* claim concluded that nothing less than a pattern and practice of discrimination in jury selection could explain the "appalling" statistics regarding the exclusion of African-Americans from jury service in Dallas County, he considered such evidence relevant only to whether petitioner had established a prima facie case, and he specifically declined to consider it in deciding the ultimate question of purposeful discrimination. JA 24-25, 958, 966. The district judge adopted the magistrate judge's recommendations and denied relief. JA 25. The district court also denied petitioner's application for a COA. *Id.*

The Fifth Circuit dismissed petitioner's *Batson* claim and denied a COA, concluding that the "findings of the state court that there was no disparate questioning of the *Batson* jurors and that the prosecution's reasons for striking the jurors was due to their reluctance to assess and/or their reservations concerning the death penalty are fully supported by the record." JA 1001.

4. This Court granted certiorari and reversed. With one dissent, the Court had "no difficulty concluding" that that court of appeals' decision should be reversed and that a COA should have issued. JA 36. The Court identified two fundamental flaws in the Fifth Circuit's analysis. First, the Fifth Circuit had incorrectly decided the merits of the underlying constitutional claim rather than the "debatability" of that claim as is required in determining whether a COA should issue. JA 37. Second, in addressing the merits, the Fifth Circuit had seriously erred in its analysis and evaluation of petitioner's evidence. JA 36. To correct the Fifth

Circuit's flawed approach, this Court provided clear instruction on the manner in which the evidence here should be evaluated under *Batson*'s three-step framework.

The Court explained that its "determination to reverse the Court of Appeals" required it "to explain in some detail" its "preliminary" assessment of the "extensive evidence" of discrimination in jury selection in petitioner's case. JA 26, 33. The Court observed that both the district court and the court of appeals had failed to "give full consideration to the substantial evidence petitioner" presented. JA 36. Instead, they had mistakenly "accepted without question the state court's evaluation of the demeanor of the prosecutors and jurors in petitioner's trial." *Id.* This Court explained that the federal courts' deference to the state trial court's finding was misplaced, in part because "the state trial court had no occasion to judge the credibility" of the prosecutors' proffered race-neutral reasons at the time they were made, but only two years later. JA 37. "As a result, the evidence presented to the trial court at the *Batson* hearing was subject to the usual risks of imprecision and distortion from the passage of time." *Id.*

This Court then took up each category of evidence of racial discrimination identified by petitioner and explained both how the court of appeals had failed to address that evidence properly and how that evidence should be analyzed. *First*, the Court questioned the credibility of the State's after-the-fact explanations for its peremptory strikes by noting that "three of the State's proffered race-neutral rationales for striking African-American jurors pertained just as well to some white jurors who were not challenged and who did serve on the jury." JA 37. *Second*, the Court "question[ed] the Court of Appeals' and state trial court's dismissive and strained interpretation of petitioner's evidence of disparate questioning." JA 38. Contrary to the conclusion of the state court, this Court found that "[d]isparate questioning did occur" (*id.*)—both with respect to views on the death penalty and with respect to minimum sentencing—and further observed that the State had failed even to offer an ex-

planation for its racially disparate questioning about minimum sentences (JA 39). Moreover, the Court noted, "while petitioner's appeal was pending before the Texas Court of Criminal Appeals, that court found a *Batson* violation where this precise line of disparate questioning on mandatory minimums was employed by one of the same prosecutors who tried the instant case." JA 40. Thus, the Court concluded that, based on its "threshold examination," the record indicated that "the prosecutors designed their questions to elicit responses that would justify the removal of African-Americans from the venire." *Id.*

Next, this Court examined the prosecutors' use of the so-called jury "shuffles" to manipulate the racial composition of petitioner's jury. "We agree with petitioner," the Court stated, "that the prosecution's decision to seek a jury shuffle when a predominant number of African-Americans were seated in the front of the panel, along with its decision to delay a formal objection to the defense's shuffle until after the new racial composition was revealed, raise a suspicion that the State sought to exclude African-Americans from the jury." JA 40. The Court's concerns were "amplified by the fact that the state court also had before it, and apparently ignored, testimony demonstrating that the Dallas County District Attorney's Office had, by its own admission, used this process to manipulate the racial composition of the jury in the past." *Id.* The Court found that the prosecution's behavior during the jury shuffles "tends to erode the credibility of the prosecution's assertion that race was not a motivating factor in the jury selection." *Id.*

Finally, the Court turned to the "historical evidence of racial discrimination by the District Attorney's Office." JA 41. The Court thought it significant that for many decades "African-Americans almost categorically were excluded from jury service" in Dallas County. *Id.* The Court pointed out that "[o]nly the Federal Magistrate Judge addressed the import of this evidence in the context of a *Batson* claim; and he found it both unexplained and disturbing." *Id.* In the Court's view, the evidence "reveals that the culture of the

District Attorney's Office in the past was suffused with bias against African-Americans in jury selection." *Id.* In explaining why this evidence was "of course . . . relevant" to the ultimate resolution of petitioner's claim of racial discrimination at step three of the *Batson* framework, the Court observed that "[b]oth prosecutors joined the District Attorney's Office when assistant district attorneys received formal training in excluding minorities from juries" and that "[t]he supposition that race was a factor could be reinforced by the fact that the prosecutors marked the race of each prospective juror on their juror cards." *Id.*

In closing, the Court emphasized the unreliability of the state courts' assessment of petitioner's claim. The Court pointed out that the "state courts [had] made no mention" at all of "either the jury shuffle or the historical record of purposeful discrimination." JA 42. The Court's dissatisfaction with the state courts' handling of petitioner's case was "heightened" by the fact that although the state trial court had been "presented with this evidence," it still "somehow reasoned that there was not even the inference of discrimination to support a prima facie case"—a "clear error" that "the State declines to defend[.]" *Id.* The Court reversed and remanded for reconsideration in light of its opinion.

5. The Fifth Circuit's opinion on remand incorporated *verbatim* (but without attribution) passages from the dissenting opinion in this Court and from the State's brief (which in turn largely repeated the State's unsuccessful brief in this Court). The Fifth Circuit denied relief, concluding despite this Court's extensive analysis of the evidence that petitioner "has failed to show by clear and convincing evidence that the state court erred in finding no purposeful discrimination." JA 20.

In so ruling, the court of appeals barely considered Dallas County's long history of racial discrimination in jury selection, giving that evidence less attention than this Court had already done in what it characterized as only a "threshold examination." JA 41. The court dismissed "the relevancy of [the] evidence as less significant" because peti-

tioner had "already met the burden under the first step of *Batson*" (JA 7-8), even though this Court had made plain that petitioner's having established his prima facie case at step one should have no impact on the continuing probative weight at step three of the "unexplained and disturbing" evidence of Dallas County prosecutors' extended history of racial selectivity in picking juries (JA 41).

The court of appeals gave even less attention to the evidence concerning the State's efforts to use the "jury shuffles" to keep African-Americans off petitioner's jury. The court offered no explanation for those efforts, which on their face betray the prosecution's discriminatory intent.

The court of appeals gave more space to discussing whether there were any non-African-American jurors who were similar to the African-Americans struck by the prosecution. But it prefaced its entire discussion with the observation that "[o]nce we have identified the reasons for the strikes, the credibility of the [prosecutors'] reasons is *self-evident*." JA 9 (emphasis added).

Finally, despite this Court's determination that "[d]isparate questioning did occur" (JA 38), the court of appeals continued to insist that the prosecution "did not question venire members differently[.]" JA 19. In the court of appeals' view, the "great[] disparity along racial lines" (JA 39), that this Court discerned in the prosecution's methods of questioning venire members was entirely explained by venire members' views about the death penalty. JA 16-20.

This Court again granted certiorari. JA 1052.

SUMMARY OF ARGUMENT

In its first review of petitioner's case, this Court conducted a meticulous examination of the several kinds of evidence in the record bearing upon his claim that African-American prospective jurors had been systematically stricken from his jury on account of race. The Court's opinion explained the relevance of each category of evidence to the ultimate issue of racial motivation at the third step of the three-step inquiry required by *Batson* v. *Kentucky*. Responding to the Fifth Circuit's cursory and dismissive treatment of the evidence, this Court was at pains to model in detail the appropriate method for analyzing each sort of evidence first in its own right and then all together, as is necessary for effective implementation of *Batson*. It sent the case back to the Fifth Circuit to conduct the requisite analysis.

On remand, the Fifth Circuit simply did not do that. It again dismissed out of hand two of the four kinds of evidence that this Court had found relevant. In reviewing the remaining two categories of evidence, it disregarded the issues framed by this Court's analyses and relied centrally on abstracts of the record taken verbatim from the State's brief on remand, which had taken many of them in turn from the dissenting opinion in this Court. It treated each category of evidence in isolation and declared it insufficient standing alone, without analyzing the cumulative weight of all the evidence of racial discrimination.

To clarify and fulfill the commands of *Batson* and *Miller-El I*, it remains for this Court to demonstrate how the analytic methods prescribed by those decisions should actually be applied in evaluating evidence. This record is uniquely suitable for such a demonstration because of the clarity with which the evidence comes together to refute the State's claim that race played no part in its prosecutors' decision to strike all but one qualified African-American from the *Miller-El* trial jury. As this Court has already observed, four clusters of evidence combine to show that the prosecutors were predisposed to exclude African-Americans from the jury and in fact engaged in exclusionary behavior that cannot be explained on grounds other than race. Taken together, the totality of mutually-reinforcing evidence of racially discriminatory motive and behavior overwhelmingly establishes that the State's proffered race-neutral justifications for striking African-American jurors were mere pretexts for unconstitutional discrimination.

First, the record demonstrates that the culture of the Dallas County D.A.'s office was suffused with bias against

African-American jurors at the time of petitioner's trial and that the very prosecutors in petitioner's case had previously engaged in racist jury selection practices. As this Court observed, this stark evidence of historical discrimination impeaches the State's defense of its racially disproportionate peremptory strikes and the reasonableness of the state trial court's decision, which failed to mention the historical record at all.

Second, the record demonstrates that the prosecutors used the jury-shuffle process to exclude African-Americans from the voir dire process when it had no information about veniremembers other than race. Yet the State has persistently failed even to *offer* a race-neutral explanation for its prosecutors' use of jury shuffles.

Third, the record demonstrates that the State engaged in racially disparate questioning in order to create artificial grounds for striking African-American jurors. The State concedes that it employed disparate questioning, but maintains that—despite its prosecutors' obvious preoccupation with excluding African-Americans from the jury—race was not among the factors it indulged in selecting jurors to target. As this Court concluded, however, even the State's own view of the evidence does not support its claim that race was not a trigger for manipulative questioning.

Fourth, the record demonstrates—and this Court concluded—that the State's proffered race-neutral rationales for striking six African-American jurors pertained equally well to some white jurors who were not challenged and who served on the jury. Even one instance of race-based juror exclusion would, of course, violate petitioner's constitutional rights.

Despite this overwhelming evidence that the state trial court erred in crediting the State's patently pretextual explanations, the Fifth Circuit accepted the trial court's conclusion. That is unacceptable, and this Court should now say so, giving concrete meaning to its earlier admonition that "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review." JA 35.

ARGUMENT

I. THE COURT OF APPEALS FAILED TO FOLLOW THIS COURT'S DIRECTION TO CONSIDER FULLY THE EVIDENCE OF A LONGSTANDING PATTERN AND PRACTICE OF DISCRIMINATION.

There is no more striking feature of this case than the long, sorry history of intentional race discrimination in jury selection practiced by the Dallas County D.A.'s office up through and extending beyond the time of petitioner's trial, a history termed "appalling" by the federal magistrate. JA 966. In the light of that history, this Court recognized that bias in jury selection "suffused" the culture of the D.A.'s office at the time of petitioner's trial. JA 41. The detailed evidence of that history is set forth in petitioner's brief on the merits in *Miller-El I*. Pet. Br. 3-8, No. 01-7662 (U.S. 2002).[1]

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[1] At the time of trial in this case, Dallas County's extensive record of race discrimination in jury selection was well documented. In *Hill* v. *Texas*, 316 U.S. 400 (1942), this Court addressed practices that, prior to 1940, completely excluded African-Americans from county grand juries. Noting that "chance or accident could hardly have accounted for the continuous omission of negroes from the grand jury lists for so long a period," the Court concluded that Dallas County jury commissioners had "discriminate[d] in the selection of jurors on racial grounds." *Id.* at 404. In *Cassell* v. *Texas*, 339 U.S. 282, 286 (1950), this Court concluded that "subsequent to the *Hill* case the Dallas County grand-jury commissioners . . . consistently limited Negroes selected for grand-jury service to not more than one on each grand jury." Thus, this Court held, Dallas County continued unconstitutionally to discriminate against African-Americans with respect to grand jury service.

Henry Wade was first elected Dallas County District Attorney in 1951, the year after *Cassell* was decided, and served until 1987, the year after petitioner was convicted. JA 1019, 1028, 1038. According to a *Dallas Morning News* study published shortly before petitioner's trial, despite *Hill* and *Cassell*, the D.A.'s office engaged throughout Wade's tenure in a consistent practice of striking African-Americans from juries in serious criminal cases, particularly where the defendant was African-American. JA 1028. The story quoted District Judge Jack Hampton, who had served on Wade's staff from 1958 to 1962, as saying that after he once allowed an African-American woman to serve as a juror in a criminal case

After considering it, this Court concluded that African-Americans in Dallas County "almost categorically were excluded from jury service." JA 41.

This Court emphasized the importance of this history to resolution of petitioner's *Batson* claim in two key respects. *First*, historical evidence of racial discrimination by the District Attorney's office was clearly relevant to the ultimate question of purposeful discrimination in selecting petitioner's jury. JA 41. Specifically, such evidence—though adduced in part to support petitioner's prima facie case—should also be weighed in making the ultimate determination under step three of *Batson* whether to credit the prosecutors' purported race-neutral reasons for their racially disproportionate peremptory strikes. As this Court explained, such bias is "of course . . . relevant to the extent it casts

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that eventually ended in mistrial, Wade reprimanded him: "If you ever put another nigger on a jury, you're fired." *Id.*

Studies conducted by the *Dallas Morning News* in 1986 showed that discriminatory jury selection practices in Dallas County continued unabated in the 1980s. One study analyzed 100 randomly selected felony jury trials conducted in Dallas County between 1982 and 1984. JA 1022. It demonstrated that prosecutors "routinely manipulate[d] the racial composition of juries through their use of peremptory challenges." JA 1018. In the 100 trials studied (which involved approximately 4,434 prospective jurors), 92% of the African-Americans peremptorily struck were struck by prosecutors. JA 1022. Consequently, although African Americans comprised 18% of the Dallas County population in 1986, they accounted for fewer than 4% of jurors in felony trials. JA 1018.

Another *Dallas Morning News* study revealed that, almost exclusively due to prosecutors' use of peremptory strikes, nine out of every ten African Americans qualified to serve on capital murder juries between 1980 and 1986 were never permitted to do so. JA 1036. In the fifteen capital trials studied, prosecutors were responsible for striking 98% of the African Americans eliminated from jury service by peremptory strikes. *Id.* When combined with the prosecution's use of for-cause challenges, this practice meant that only one in twelve African American veniremembers were selected as jurors in Dallas County capital cases between 1980 and 1986, compared to a rate of one in three for whites and one in four for Latinos. JA 1037.

doubt on the legitimacy of the motives underlying the State's actions in petitioner's case." *Id.*

Second, this Court made clear that the state courts' failure even to "mention . . . the historical record of purposeful discrimination" in evaluating petitioner's claim, and the trial court's indefensible conclusion "that there was not even the inference of discrimination to support a prima facie case," weighed heavily against the validity of their ultimate determination of a lack of purposeful discrimination. JA 42.

Despite this Court's clear rulings, the Fifth Circuit disregarded the historical evidence in both respects. Rather than weighing the credibility of the prosecutors' proffered race-neutral reasons against this backdrop of an established pattern of racial discrimination in jury selection, as this Court directed, the Fifth Circuit did just the opposite. This Court had ruled that "[i]t goes without saying" that such evidence bears strongly on the issue of pretext at step three of *Batson* (JA 35), taking careful note of the fact that petitioner had already met step one, but insisting that the powerful historical evidence had to be considered in step three as well (JA 41). Yet the Fifth Circuit discounted the relevance of the historical evidence at step three, "because Miller-El has already met the burden under the first step of *Batson* and now must prove actual pretext in his case." JA 7-8.

Indeed, perhaps most strikingly, the Fifth Circuit failed altogether to acknowledge, let alone weigh the significance of, the fact that both prosecutors involved in petitioner's jury selection—Paul Macaluso and James Nelson—were personally implicated in the Dallas D.A.'s Office's history of racial discrimination. They both joined when that office formally trained its prosecutors to exclude minorities from juries. JA 41.[2] As this Court indicated, that evidence alone

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[2] A 1963 Dallas County D.A.'s office manual instructed prosecutors to exercise peremptory strikes against African-Americans and members of other minority groups: "'Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how

bolsters the "supposition that race was a factor" in petitioner's jury selection. *Id.* Moreover, both prosecutors engaged in discriminatory jury selection tactics in other cases during the same period, leading to the reversal of two convictions on *Batson* grounds. As this Court noted, in a case tried shortly before petitioner's, Macaluso was found to have engaged in the same disparate questioning on the basis of race that was employed in this case, to have used peremptory strikes improperly to exclude African Americans, and to have offered false, pretextual explanations for his actions in selecting the jury in that case. JA 40; *see Chambers* v. *State*, 784 S.W.2d 29, 31-32 (Tex. Crim. App. 1989) (en banc). Nelson was lead prosecutor in the trial of petitioner's wife just three months after petitioner's trial, in which the prosecution's purported race-neutral reason for one of its peremptory strikes was found to be a pretext for purposeful racial discrimination. *See Miller-El* v. *State*, 790 S.W.2d 351, 357 (Tex. App.—Dallas 1990).[3] Moreover, this Court noted, the

well educated . . . . [T]hey will not do on juries.'" JA 1028. In 1969, Assistant D.A. John Sparling drafted another manual, used in training sessions (JA 808-810, 865-866, 869-871, 874-875) and distributed to incoming prosecutors under the title "Jury Selection in a Criminal Case." JA 99. This manual advised that selection of jurors should "depend on . . . the age, color and sex of the Defendant" (*id.*), and that prosecutors should exclude "any member of a minority group which may subject him to oppression" (JA 100). According to the manual, "[m]inority races almost always empathize with the Defendant." JA 102. The Sparling manual served as a training tool into the 1980s, *see Ex Parte Haliburton*, 755 S.W.2d 131, 133 n.4 (Tex. Crim. App. 1988), and was therefore part of the training given to the prosecutors who handled jury selection in petitioner's case. Macaluso joined the Dallas County DA's office in the early 1970s. JA 900. Nelson joined the office in 1980. *See* http://www. lockeliddell.com (website of Nelson's current firm, which lists his professional background) (last visited on Sept. 2, 2004).

[3] Following this Court's decision in *Batson*, several other Dallas County criminal convictions were overturned on the ground that prosecutors had used peremptory challenges improperly to remove African American veniremembers. *See, e.g., Young* v. *State*, 848 S.W.2d 203 (Tex. App.—Dallas 1992); *Ramirez* v. *State*, 862 S.W.2d 648 (Tex. App.—Dallas 1993); *Chivers* v. *State*, 796 S.W.2d 539 (Tex. App—Dallas 1990, pet. ref'd); *Hill* v. *State*, 827 S.W.2d 860 (Tex. Crim. App.) (en banc), *cert. denied*, 506 U.S. 905 (1992); *C.E.J.* v. *State*, 788 S.W.2d 849 (Tex. App.—Dallas 1990, writ denied); *Vann* v. *State*, 788 S.W.2d 899 (Tex. App.—Dallas 1990, pet. ref'd); *Reich-Bacot* v. *State*, 789 S.W.2d 401 (Tex. App.—Dallas 1990); *Crouch* v. *State*, 1993 WL 265424 (Tex. App.—Dallas, July 12, 1993, pet. ref'd).

supposition that race influenced the prosecutors' voir dire tactics "could be reinforced by the fact that the prosecutors marked the race of each prospective juror on their juror cards." JA 41. The Fifth Circuit found Macaluso and Nelson's race-neutral justifications here to be credible without even mentioning these considerations.

The court of appeals also ignored this Court's observation that the state courts' handling of the historical evidence discredited their evaluation of the credibility of the prosecutors' evaluations. Instead, the Fifth Circuit blankly asserted that the state court was "in the best position to make a factual credibility determination, heard the historical evidence and determined the prosecutors' race-neutral reasons for the peremptory strikes to be genuine." JA 8. In so ruling, the Fifth Circuit failed to acknowledge another of this Court's central observations: that the trial court conducted the *Batson* hearing more than two years after jury selection, significantly reducing any advantage in making credibility determinations (JA 37), and that these determinations were made by a trial judge who, even after a remand in which the Texas Court of Criminal Appeals had found that petitioner had met his step-one burden, "somehow" explicitly concluded that he had not done so (JA 42).

Had the Fifth Circuit followed this Court's direction concerning the historical evidence—evidence about policies in place in the D.A.'s office *at the time of petitioner's trial* and evidence about the practices of *the very prosecutors* in petitioner's case—and this Court's direction concerning the shortcomings of the state court's process and determinations, then the Fifth Circuit could not have deferred to those state-court determinations. It would instea have been compelled to recognize the lack of credibility in the prosecu-

tors' claims that race played no part in their decisions to strike all but one qualified African-American from petitioner's jury.

II. THE COURT OF APPEALS FAILED TO FOLLOW THIS COURT'S DIRECTION TO WEIGH THE EVIDENCE THAT THE PROSECUTORS USED JURY SHUFFLES TO MANIPULATE THE RACIAL COMPOSITION OF THE JURY.

This Court also directed the Fifth Circuit to consider the evidence regarding "jury shuffles." JA 40. The jury shuffle is a technique the Dallas County District Attorney's Office used—by its own admission—to "manipulate the racial composition of the jury." *Id.* Under Texas criminal practice, parties are permitted to "rearrange the order in which members of the venire are examined so as to increase the likelihood that visually preferable venire members will be moved forward and empaneled." JA 28. The party requesting the procedure, with no information beyond the appearance of the venire members, "literally shuffles the juror cards, and the venire members are then reseated in the new order." *Id.* Venire members who are shuffled to the back of the seating area are unlikely ever to serve, because any member not questioned during voir dire is dismissed at the end of the week. JA 28-29.

This Court agreed with petitioner that "on at least two occasions the prosecution requested shuffles when there were a predominant number of African-Americans in the front of the panel" and that "[o]n yet another occasion the prosecutors . . . lodged a formal objection [to a defense shuffle] only after the postshuffle panel composition revealed that African-American prospective jurors had been moved forward." JA 29. Such behavior, this Court concluded, "raise[s] a suspicion that the State sought to exclude African-Americans from the jury" and "tends to erode the credibility of the prosecution's assertion that race was not a motivating factor." JA 40. This Court also specifically faulted the state court for "apparently ignor[ing]" evidence that the District Attorney's Office had admittedly used jury shuffles for just such a racially discriminatory purpose. *Id.*

But on remand the Fifth Circuit declined to give any weight to the State's discriminatory use of jury shuffles, asserting without analysis that the evidence fails to "overcome" the State's race-neutral explanation for its use of peremptory strikes, and relying inexplicably on the factually incorrect and legally irrelevant proposition that "Miller-El shuffled the jury five times and the prosecutors shuffled the jury only twice." JA 8.[4] The opinion below omits to mention that, on two occasions, the State attempted to use procedural motions to undo defense shuffles that moved (or would otherwise have moved) African-American prospective jurors forward in the seating arrangement.[5] These strategic ma-

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[4] The statement is factually inaccurate because, as both petitioner and the State agreed before this Court and the Fifth Circuit, the prosecution successfully shuffled the jury *three* times. The state shuffled the jury during the first week, at a point when the record does not disclose the racial composition of the panel (*see* JA 113-114), and also during the second and third weeks, at points when the record reveals that "there were a predominant number of African-Americans in the front of the panel" (JA 29; *see also* JA 530 (second week prosecution shuffle of seating array containing seven African-Americans within the first 20 jurors) & 124-129 (third week prosecution shuffle of seating array containing six African-Americans within the first 15 jurors)).

The Fifth Circuit's mention of *petitioner's* use of jury shuffles is legally irrelevant because petitioner's behavior cannot mitigate the State's race-based use of jury shuffles. The only relevant question is whether the State—not petitioner—exercised its jury shuffles in service of a constitutionally impermissible purpose, thereby reflecting a desire to remove African-Americans from the jury based solely on their race. *Cf. Gray* v. *Mississippi*, 481 U.S. 648, 663 (1987) (constitutional harm from improper grant of State's for-cause challenge is not cured by improper denial of earlier State for-cause challenge, because the Court "cannot condone the 'correction' of one error by the commitment of another").

[5] During the third week of voir dire, the prosecution shuffled first, the defense shuffled second, and the prosecution formally objected to the defense shuffle only *after* learning that "African-American prospective jurors had been moved forward." JA 29. During the fourth week, the prosecution declined to shuffle, the defense shuffled, and the prosecution belatedly (and unsuccessfully) argued that it should be allowed to shuffle after observing the results of the defense shuffle. JA 621-622; *see also* Pet. Rep. Br. 14 n.17, *Miller-El I*, No. 01-7662 (U.S. 2002).

neuverings are powerfully probative of an intent to exclude qualified African-Americans from the jury, particularly because both motions were criticized by the trial court at the time as substantively baseless.[6] The Fifth Circuit also failed to acknowledge "testimony demonstrating that the Dallas County District Attorney's Office had, by its own admission, used [the jury-shuffle] process to manipulate the racial composition of the jury in the past"—evidence the state court refused to consider but that "amplified" this Court's concerns. JA 40, 42.

After mischaracterizing or ignoring critical evidence, the Fifth Circuit then proceeded to consider whether the jury-shuffle evidence could "overcome" the State's explanation for its use of peremptory challenges. JA 8. But, as this Court had already explained, the question is *not* whether each individual piece of evidence can itself "overcome" the proffered race-neutral reasons: the question is whether the cumulative weight of such evidence so erodes the credibility of the prosecution's assertion that race was not a factor that the assertion becomes "simply too incredible" to believe. *Hernandez* v. *New York*, 500 U.S. 352, 369 (1991). Specifically, this Court explained that although the ultimate issue in any *Batson* inquiry is the prosecution's use of peremptory challenges, the jury-shuffle evidence was quite relevant to the intermediate issue of whether the prosecution was preoccupied with keeping African-American jurors off of petitioner's jury. JA 40. Yet the Fifth Circuit simply skipped this intermediate step of the analysis. Indeed, the Fifth Circuit's way of analyzing the case consistently disregards the very process of examining the "cumulative weight" of petitioner's numerous, mutually supportive items and kinds of evidence of racial motivation on the prosecutors' part: it takes up one or another piece of evidence in isolation, concludes that that piece of evidence alone does not overcome the prosecutors' profession of race-neutral justifications, and then passes on to the next.[7]

Had the Fifth Circuit conducted the analysis this Court instructed it to conduct, it would have been compelled to conclude that the "jury-shuffle" evidence adds substantially to petitioner's cumulative showing of racial motivation in the prosecutors' jury selection tactics. The jury-shuffle procedure provides a perfect opportunity for those "'who are of a mind to discriminate,'" *Batson*, 476 U.S. at 96 (quoting *Avery* v. *Georgia*, 345 U.S. 559 (1953)), and here the prosecution used that opportunity to attempt to exclude African-Americans from the jury when it had "no information about the prospective jurors other than their appearance." JA 28.

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[6] The prosecution's stated rationale for its delayed objection to petitioner's jury shuffle in the third week was that the physical shuffling of the cards was not sufficiently vigorous and that the process was conducted in the central jury room rather than the courtroom. JA 124-130. The trial judge denied the motion with the observation that "I've sat and practiced law in Dallas County for twenty-five years or longer and we've always gone to the central jury room to do it in the manner in which it was done in this case." JA 131. As for the prosecution's untimely assertion in the fourth week that it had the right to shuffle *after* the defense had shuffled, the trial judge noted simply that "[t]he way I've been operating is, to give the State the first opportunity to shuffle and if they accept or object, that's it." JA 622.

[7] *See, e.g.*, JA 8 ("accordingly the general historical evidence does not prove by clear and convincing evidence that the state court's finding of the absence of purposeful discrimination in Miller-El's jury selection was incorrect"); *id.* ("Again, Miller-El's circumstantial evidence of jury shuffles does not overcome the race-neutral reasons . . . accepted by the state court . . . ."); JA 16 ("Miller-El has failed to identify any unchallenged non-black venire member similarly situated to the six struck black venire members . . . . *Therefore*, he has failed to demonstrate by clear and convincing evidence that the state court erred in finding the prosecution's reasons for exercising its peremptory challenges credible") (emphasis added). Only once in the court of appeals' opinion is any reference made to a cumulative analysis of the evidence, where—after having taken up each of Miller-El's "areas of evidence" (JA 6), one by one and declared each one insufficient—the court concludes: "In summary, none of the four areas of evidence Miller-El based his appeal on indicate, either collectively or separately, by clear and convincing evidence that the state court erred" (JA 20). Notably, not a single word of analysis is provided to support the "collectively" part of this conclusion, beyond what had earlier been asserted *seriatim* to demonstrate the "separately" part.

In fact, the State has had ample occasion—once before the trial court, twice before the Fifth Circuit, and three times before this Court—to explain its use of jury shuffles on race-neutral grounds, and yet has failed even to *offer* such an explanation. The shuffles thus provide a clear window into the prosecutors' state of mind and forcefully undermine "the credibility of the prosecution's assertion that race was not a motivating factor in the jury selection." JA 40.

III. The Court Of Appeals Failed To Follow This Court's Guidance To Consider The Evidence That The Prosecution Used Disparate Questioning To Remove African-Americans From The Jury.

This Court firmly concluded that the prosecutors had questioned venire members differently based on race and specifically warned that "if the use of disparate questioning is determined by race at the outset, it is likely a justification for a strike based on the resulting divergent views would be pretextual." JA 39. This Court criticized the state court's and the Fifth Circuit's "dismissive and strained" interpretation of the record on this central point. JA 38.[8]

Yet on remand, the Fifth Circuit continued to treat dismissively this likely evidence of pretextual strikes. After mischaracterizing or ignoring large parts of the voir dire record as well as petitioner's arguments, and even going so far as to posit facts not contained in the record, the court of appeals concluded that the prosecution's disparate questioning could be adequately explained on the basis of jurors' views

[8] The state trial court found that there had been no disparate questioning (JA 929), and the Fifth Circuit, in denying petitioner's COA, concluded that the state court's findings were "fully supported by the record," JA 38 (quoting JA 1001). But as this Court concluded, "[d]isparate questioning *did* occur" concerning potential jurors' views on the death penalty and on minimum sentencing. *Id.* (emphasis added); *see also* JA 26-28.

on the death penalty and not jurors' race. That conclusion is indefensible.[9]

A. Views On The Death Penalty

For some potential jurors, the prosecutors prefaced questions about the jurors' views on the death penalty with a graphic description of an execution. JA 26-27, 39. This graphic description was used for 53% of African-American jurors (8 out of 15), but for only 6% of white jurors (3 out of 49). JA 39.

The State conceded before this Court that the prosecutors' trial strategy had been to use the graphic script on jurors who had "expressed doubts as to the death penalty on their juror questionnaires" (JA 39), but who were not subject to removal for cause. In other words, the State admitted that its prosecutors had deliberately manipulated the jury-selection process to invent spurious grounds of challenges for cause in order to excuse potential jurors whom they disfavored for reasons that they could not forthrightly disclose without running afoul of the law. *See Witherspoon* v. *Illinois*, 391 U.S. 510, 520-523 (1968) (holding that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction"). Thus, these prosecutors were not above manufacturing pretextual grounds to challenge jurors they wished to eliminate for covert tactical reasons. Yet the State maintained that race was not among the covert reasons the prosecution indulged in choosing jurors to target.

[9] Remarkably, the Fifth Circuit's analysis of the disparate questioning issue consisted almost entirely of passages taken nearly *verbatim* and without attribution from the *dissent* to this Court's opinion (*compare* JA 59-63 (Thomas, J., dissenting) *with* JA 17-20), despite the obvious fact that this Court's majority had plainly already considered and rejected this line of argument.

This Court rejected the State's position, finding that it "cannot be accepted without further inquiry" because "the State's own evidence is inconsistent with that explanation." JA 39. As the Court explained, even by the State's own reckoning, 70% of the African-American jurors who expressed doubts about the death penalty received the graphic script, while only 20% of the white jurors who had expressed similar doubts received that script. *Id.*

Yet on remand, the State offered a nearly identical explanation for its disparate questioning and the Fifth Circuit unquestioningly accepted it, stating that "[t]he record . . . reveals that the disparate questioning of venire members depended upon the member's views on capital punishment and not race." JA 16. Far from conducting the "further inquiry" into the State's justifications that this Court had ordered (JA 39), the Fifth Circuit simply shrugged off—or accepted factually baseless grounds for disparaging—petitioner's abundant showing that the justifications were pretextual.

The Fifth Circuit began its analysis by asserting that "Miller-El contends that" there were ten African-American and ten white jurors who expressed reservations about the death penalty, but that seven of the African-American jurors received the graphic script while only two of the white jurors received this script. JA 17. The Fifth Circuit then stated that, of these ten white jurors, the eight who failed to receive the graphic script "[p]resumably" answered both questionnaire items relating to the death penalty in a manner that unambiguously demonstrated their opposition to the death penalty. JA 17-18.[10] Adopting a theory first offered in Justice Thomas's dissenting opinion, the court hypothesized that these jurors "were so opposed to the death penalty there was no need to give them a detailed description in order to find out their thoughts; in fact, a detailed description may have simply antagonized them and turned them off to the prosecutors." JA 18; *see also* JA 58 (Thomas, J., dissenting).

[10] Question 56 asked, "Do you believe in the death penalty?" and Question 58 asked, "Do you have any moral, religious, or personal beliefs that would prevent you from returning a verdict which would ultimately result in the execution of another human being?" JA 17.

The Fifth Circuit's hypothetical rationalization of the prosecution's behavior is implausible for at least four reasons. *First*, contrary to the Fifth Circuit's assertion, in that court as well as before this Court it was the *State*, *not* Miller-El, that identified ten white and ten African-American jurors as having expressed reservations about the death penalty.[11] Before the Fifth Circuit, Miller-El identified eight additional white jurors who expressed reservations,[12] meaning that although African-American jurors expressing reservations faced a 70% chance (7 of 10) of getting the graphic script, white jurors expressing similar reservations actually faced only an 11% chance (2 of 18) of getting that script. The Fifth Circuit failed, without explanation, to consider these additional eight jurors as part of its mandated "further inquiry." JA 39.

Second, the Fifth Circuit's findings about the questionnaires of the eight white jurors conceded by the State to have expressed reservations without receiving the graphic script are sheer speculation. As Justice Thomas's dissenting opinion acknowledged, *none of those jurors' questionnaires*

[11] This Court based its conclusion that a COA was warranted on the State's own position regarding the comparability of the ten white and ten African-American jurors because an initial examination of that comparison alone was sufficient to render the State's race-neutral explanation untenable and internally inconsistent. *See* JA 39 (noting that the comparison was based on "the State's calculations"). But the fact that the Court could resolve the issue at that stage of the analysis based on the State's figures in no way excused the Fifth Circuit from considering petitioner's full case on remand.

[12] *See* Reply Br. of Petitioner-Appellant at 6-7 & n.3, *Miller-El* v. *Cockrell*, No. 00-10784 (5th Cir. 2003). In addition to the 10 white jurors identified by the State, white jurors Mazza, Hearn, Vickery, Salsini, Duke, Sohner, Crowson, and Whaley expressed hesitancy. Two of those, Mazza and Hearn, ultimately served on the jury.

were part of the record in this case. JA 59.[13] The Fifth Circuit simply "presum[ed]" that the contents of these questionnaires supported the State's contentions. JA 17-18.[14] But § 2254(d)(2) and (e)(1) require an evaluation of the determinations *actually made* by the state court "in light of the evidence presented in the state-court proceeding." Evidence outside that record—particularly evidence that is only "presumed" to exist—is thus not relevant. In any event, as this Court pointed out, if such evidence had existed, "it cannot be assumed that the State would have refrained from introducing it." JA 39-40 (internal citations and quotation marks omitted).

Third, the Fifth Circuit should not have accepted the State's counterintuitive notion that the prosecution would *avoid* giving the graphic script to jurors who adamantly opposed the death penalty, for fear of offending them. This theory was first suggested in the dissent to this Court's opinion. It was first adopted by the State only on remand. The theory attracted no support among the Justices who formed the majority of this Court and rests on two dubious assumptions: (1) that the two yes-or-no questionnaire items addressing the death penalty would allow the prosecution to distinguish with confidence between jurors merely hesitant about the death penalty and those adamantly opposed to it; and (2) that the prosecution would be concerned about offending the sensibilities of the second category of jurors who could, by definition, be struck for cause.[15] Far more plausible is the State's initial position before this Court (which is additionally more plausible because it *is* the State's initial position)—that a race-neutral prosecutor would give the graphic script to any juror whose questionnaire expressed doubts about the death penalty, whether strong or weak, and whether the juror was white or African-American. JA 39.

[13] Petitioner sought discovery of the remainder of the white jurors' questionnaires in federal district court but was denied access to this information.

[14] The questionnaires represent all the information (besides visual information about race) that the prosecution had about jurors before deciding whether to give the graphic script at the outset of voir dire.

[15] As it turned out, of the eight white jurors who purportedly were adamantly against the death penalty, five were removed for cause, one by agreement, and two based on the prosecution's use of peremptory challenges. JA 18. Thus, the prosecution would have run no risk in offending any of these individuals with the graphic script, since none ultimately served, and might have saved itself two peremptory strikes by giving the graphic script to all eight jurors, possibly eliciting testimony from the final two that would have supported their removal for cause.

Fourth, contrary to the Fifth Circuit's position, the white jurors' subsequent voir dire testimony does not support the suggested inference about their missing questionnaires. For instance, the Fifth Circuit concluded that white jurors Leta Girard, James Holtz, Sheila White, and Joyce Willard (none of whom received the graphic script) were adamantly opposed to the death penalty. JA 18. Yet Girard's voir dire testimony reveals that she failed to answer one of the questionnaire items regarding the death penalty (JA 624)—an omission that, in the case of African-American juror Linda Baker, the Fifth Circuit interpreted as an "ambiguous answer" justifying the prosecution's decision to give her the graphic script (JA 18, 61 & n.11; JL 71). And Holtz, White, and Willard all testified that they supported the death penalty as a matter of principle, but had doubts about whether they could personally bring themselves to the point of imposing it.[16] Moreover, as petitioner pointed out, eight *additional* white jurors expressed some reservations about

[16] White, when asked about the death penalty, stated that "I don't disagree with the law, that there is a death penalty, but for my own self, I cannot in all consciousness, you know, say that someone is guilty and, yes, they should be executed." JA 583. Willard, when asked whether she could sit on a jury giving the death penalty, answered "I don't know if I could. I believe in capital punishment. I don't know if I could be the one to do it, to be on the jury to convict someone. I don't know whether I could or not." JA 665. Holtz indicated that he "believe[d] in the death penalty in the death of a police officer" but could not impose the death penalty outside of the death of a police officer or a contract killing. JA 534-535.

the death penalty yet did not receive the graphic script. *See supra* at 25. At least four (more likely five) of them gave ambiguous answers that, if the Fifth Circuit's theory were valid, should have triggered the graphic script as well.[17] Thus, at least eight or nine white jurors expressed hesitation but not outright opposition to the death penalty, yet did not receive the graphic script. And, conversely, the Fifth Circuit's notion that the two white jurors who expressed some reservations about the death penalty on voir dire and actually received the graphic script may have registered relatively weak opposition to the death penalty in their questionnaire responses is also probably incorrect.[18] Thus, there is little to substantiate and much to undermine the weak support/strong support theory advanced by this Court's dissent and the Fifth Circuit's panel on remand.

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[17] Kevin Duke, Sandra Hearn, and Marie Mazza have questionnaires in the record and all three qualified their "yes" answers to Question 56 in ways that clearly show doubt about whether they would support imposing the death penalty on petitioner. JL 199 (Duke); JL 239 (Hearn); JL 176 (Mazza). Charlotte Whaley's questionnaire is not in the record, but she testified that she answered yes to Question 56 with the qualification "[d]epending on the circumstances." JA 715. Penny Crowson's questionnaire is not in the record, but she testified to uncertainty about her ability to impose the death penalty personally. JA 557.

[18] The Fifth Circuit presumed that white jurors Dominick Desinise and Clara Evans received the graphic script because they "expressed reservations" about the death penalty, but were "unclear" as to the strength of those reservations. JA 17-18. But, even though neither Desinise's nor Evans' questionnaire is part of the record, both testified during voir dire that they answered "No" to question 56, meaning that they did not support the death penalty. JA 573 (Desinise), 627-628 (Evans). Moreover, if the Fifth Circuit's procedure of speculating about jurors' questionnaire responses on the basis of voir dire dialogues were to be indulged, the most probable speculation would be that both of these jurors also answered yes to Question 58, indicating that they could not personally impose the death penalty. On voir dire, Desinise testified that "I can't play God and say that ... I should take [Defendant's] life" (JA 573); Evans testified that "I think probably the only time that I would myself be able to live comfortably after a death penalty that I was responsible for or partially responsible for would be if the prisoner themselves wanted it" (JA 628).

That is particularly the case because the State's strategy towards the 11 African-American jurors whose questionnaires *are* in the record could hardly have been more different than its strategy towards the white jurors. All four of the 11 African-Americans who strongly affirmed that they could impose the death penalty were spared the graphic script, while *all seven* who expressed any doubts or hesitation about the death penalty were given the graphic script. JA 18. The only reasonable explanation for this disparity is that the prosecution intended to elicit testimony that would provide an apparently race-neutral basis for striking these African-American jurors either for cause or peremptorily. And, in fact, six of the seven African-American jurors to receive the graphic script were subsequently peremptorily struck by the State. As this Court explained, "if the use of disparate questioning is determined by race at the outset, it is likely a justification for a strike based on the resulting divergent views would be pretextual." JA 39. That is precisely what happened.

B. Minimum Sentencing

The prosecutors also questioned potential jurors differently about their willingness to impose the minimum sentence for murder. JA 27-28. Under Texas law at the time of petitioner's trial, an unwillingness to impose the minimum sentence was cause for removal, *Huffman* v. *State*, 450 S.W.2d 858, 861 (Tex. Crim. App. 1970), *vacated in part sub nom. Huffman* v. *Beto*, 408 U.S. 936 (1972), and questioning in this regard was a strategy normally used by the defense to "weed out pro-state members of the venire." JA 27.

"[I]ronically," however, the prosecutors in petitioner's trial *themselves* employed this strategy. JA 27. The State conceded before this Court that the prosecutors had employed this acknowledged ruse in order to select a jury more likely to impose the death penalty, but it again maintained that race had not been a factor in deciding which jurors to attempt to disqualify. It is difficult to imagine that the State was asserting by this argument that Macaluso and Nelson—

trained as they were trained, and each found to have violated *Batson* in other prosecutions of the same vintage—relished the prospect of African-American jurors. And it is even more difficult to believe that, if these prosecutors believed African-American jurors to be undesirable, they would have refrained from excusing them by resort to the same disingenuous contrivance that the State now admits they used to accomplish a similarly clandestine purpose. But, in any event, the record refutes that the prosecutors' sole clandestine purpose was the one that the State is now willing to acknowledge.

The record shows that 94% of white jurors were informed of the statutory minimum before being asked whether that was a sentence they could impose, while only 12.4% of African-American jurors were given this information before being quizzed about what they could accept in the way of a minimum sentence for murder. JA 39. As this Court observed, the State proffered "[n]o explanation . . . for the statistical disparity." *Id.* Accordingly, this Court concluded that a "fair interpretation" of this evidence is "that the prosecutors designed their questions to elicit responses that would justify the removal of African-Americans from the venire." JA 40.

Yet, reviewing precisely the same record, the Fifth Circuit on remand concluded the opposite: that "[t]he prosecution . . . did not question [white and black] venire members differently concerning their willingness to impose the minimum punishment for the lesser-included offense of murder." JA 19. The court of appeals asserted that the prosecution used the different questioning on the minimum sentence issue only "as an effort to get venire members the prosecution felt to be ambivalent about the death penalty dismissed for cause." *Id.*; *see also* JA 62 (Thomas, J., dissenting) (same).

The Fifth Circuit's conclusion rests on two false factual premises. The first, for which the court gave no supporting record references, is that all seven of the African-American jurors who were subjected to the manipulative form of minimum-sentence questioning were sufficiently opposed to

the death penalty that the State would reasonably want to exclude them from the jury on this ground. JA 19; *see also* JA 62 (Thomas, J., dissenting) (same). This premise is at odds with the Fifth Circuit's simultaneous (and correct) finding that African-American jurors Bozeman, Fields, Warren, and Rand—all of whom were subjected to the manipulative questioning routine regarding minimum punishment—indicated on their questionnaires "that their beliefs would not prevent them from imposing a death sentence." JA 18. The Fifth Circuit reached the latter conclusion in explaining why the State decided *against* giving these four jurors the graphic execution script. *Id.* In fact, as explained in greater detail *infra* at 35-40, each of the four jurors' subsequent voir dire examinations confirms that he or she was at least as capable of imposing the death penalty as several white jurors who were not given the manipulative minimum-sentence script or peremptorily struck. Moreover, jurors Kennedy and Boggess also gave questionnaire answers and testimony indicating that they were at least as capable of imposing the death penalty as the same reference group of white jurors. *See infra* at 37-38, 40. Thus, contrary to the Fifth Circuit's unsupported finding, *six* of the seven African-American jurors who received the manipulative questioning were *not* more opposed to the death penalty than white jurors who did not receive such questioning.

The Fifth Circuit's second false premise, also unsupported by record citations, is that "there are no similarly situated non-black venire members" who should have been given the manipulative questioning routine if the prosecution had been acting in a race-neutral manner. JA 19. This contradicts a specific finding of this Court—namely that there *were* white venire members "who expressed ambivalence about the death penalty in a manner similar to their African-American counterparts" but were not subjected to manipulative questioning. JA 38, 362-365 (Mazza), 441-444 (Hearn). Moreover, as before, the Fifth Circuit also failed to consider why the State did not use manipulative questioning on the additional eight white jurors identified by petitioner as expressing doubts about the death penalty. In short, the

Fifth Circuit's analysis leaves unexplained the State's failure to use its manipulative questioning routine with the vast majority of white venire members who expressed reservations about the death penalty. JA 39-40; *see also* Pet. Reply Br. 17 n.23, *Miller-El I*, No. 01-7662 (U.S. 2002).

Finally, the Fifth Circuit never even acknowledged, much less accounted for, a fact this Court found highly significant: that while petitioner's appeal was pending, the Texas Court of Criminal Appeals "found a *Batson* violation where this precise line of disparate questioning on mandatory minimums was employed by one of the same prosecutors who tried the instant case." JA 40. All of these factors—ignored or mischaracterized by the Fifth Circuit—point to the conclusion that the prosecutors sought to exclude the African-American veniremembers based on their race.

IV. The Court Of Appeals Failed To Follow This Court's Guidance In Assessing Whether Any Non-African-American Venire Members Were Situated Similarly To The African-Americans Struck By The State.

This Court found that "[i]n this case, three of the State's proffered race-neutral rationales for striking African-American jurors pertained just as well to some white jurors who were not challenged and who did serve on the jury." JA 37. The Fifth Circuit ignored this Court's finding and held, on precisely the same record, that "there were no unchallenged non-black venire members similarly situated" to the struck African-Americans. JA 9.

The Fifth Circuit reached this conclusion by systematically discounting or ignoring the portions of the voir dire record that demonstrate the similarities between non-African-Americans accepted by the State and African-Americans struck by the State and by systematically exaggerating the

differences. Much of the Fifth Circuit's discussion of juror comparisons comes verbatim from the State's brief.[19]

Consider, first, the reasons the prosecution gave for striking African-Americans and how those reasons, as this Court found, "pertained just as well to some white jurors who were not challenged." JA 37. Those reasons were ambivalence about the death penalty, hesitancy to impose the death penalty on those who could be rehabilitated, and the criminal history of jurors' family members. JA 38.

1. *Ambivalence about the death penalty.* The State permitted at least three white veniremembers who expressed hesitancy about the death penalty to be seated on the jury. White juror Sandra Hearn did not think "*anyone* should be sentenced to a death penalty on [a] first offense." JA 429 (emphasis added). White juror Marie Mazza hesitated about her ability to impose the death penalty: "It's difficult, I know—and I've had two days to think about it. Toying with my religious upbringing, my family upbringing and such, it depends upon how I feel that the testimony was presented to me and that would be something that I would feel like I could do. It's difficult." JA 354. White juror Kevin Duke testified to "mixed emotions" regarding the death penalty, explaining that "it really should be up to [the defendant] whether he wants to die or if he wants to stay in prison the rest of his life if he was guilty . . . ." JA 393. Hearn, Mazza, and Duke, like comparable African-American jurors, later asserted their ability to resolve their doubts in favor of their ability to serve. But, unlike the African-Americans, Hearn, Mazza, and Duke were not peremptorily struck, and all three in fact served on the jury.[20]

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[19] *Compare, e.g.*, JA 9-12 *with* Br. of Respondent-Appellee at 6-13, *Miller-El* v. *Cockrell*, No. 00-10784 (5th Cir. 2003). Consistent with the view that the court of appeals simply relied on the State's brief rather than reviewing the record independently, the court neglected to provide citations for the passages from the record it quoted.

[20] White veniremember Robert Salsini also expressed only qualified support for the death penalty: "I think I could make the decision, you

2. *Hesitation based upon potential rehabilitation.* White juror Hearn stated that her willingness to impose the death penalty depended on whether the defendant could be rehabilitated. JA 429. ("I believe in the death penalty if a criminal cannot be rehabilitated and continues to commit the same type of crime. I do not think anyone should be sentenced to a death penalty on [a] first offense."). White juror Duke also expressed strong views about the virtues of rehabilitation. When questioned about a law that would permit a convicted murderer to be eligible for parole in just two years, Duke responded: "I think it's a good one. If they've changed within those two years and they can be a responsible human being and live in society, I see nothing wrong with it .... I believe in forgiving." JA 399. As noted above, Hearn and Duke both served on the jury.

3. *Family history of criminality.* The State accepted numerous white jurors whose family members had substantial criminal backgrounds. Noad Vickery testified that his sister had been incarcerated in the state penitentiary. JA 240-41. Cheryl Davis's husband had been convicted of theft. JA 695. Chatta Nix revealed not only that her brother was then on trial as part of a construction scandal, but also that she herself had been "charged with a conspiracy case" related to the scandal. JA 614. Joan Weiner's son had been arrested for shoplifting. JA 590. The State did not strike Vickery, Davis, Nix, or Weiner. It did not even question Vickery, Davis, or Nix about this information, which was on their juror questionnaires.[21]

know, come up with it, but I think it would be more of I would be forced into that position. I wouldn't be happy with it, but I could do it. I don't think I would be pleased with it. Even if there was no doubt or anything, I think I might have a problem with it in the future." JA 593. The prosecution offered no objection to Salsini; the defense later struck him.

[21] JA 220-37; 254-57 (Vickery); JA 596-612 (Nix); JA 678-95 (Davis). The defense used peremptory strikes to remove Nix, Vickery and Davis after the State declined to strike them. Weiner served on petitioner's jury.

The State's acceptance of these white jurors belies its proffered race-neutral rationales for striking the following six African-American jurors, whose views the Fifth Circuit consistently mischaracterized.

Billy Jean Fields. Although you would never know it from reading the Fifth Circuit's opinion, Fields was an ideal State's juror: a conservative, deeply religious, middle-aged family man with deep roots in the community and strong, unflinching law-and-order and pro-death penalty views. *See* JA 173-76; 191-95. Nevertheless, the prosecutors struck Fields and justified the strike by citing his views on rehabilitation, a concern that Fields' Roman Catholic faith would interfere with his application of the death penalty, and Fields' brother's criminal record. JA 196-200. But Fields checked off on his questionnaire that he believed in the death penalty and, to emphasize the point, wrote in that "[i]f you commit the crime pay the [penalty]." JL 14; *see also* JA 174-75 (indicating that Fields saw the death penalty as a deterrent to crime). As the court of appeals noted, Fields did say he believed that nearly everyone was capable of rehabilitation. JA 9-10. But in contrast to white juror Hearn, he made it absolutely clear that he would vote for the death penalty *even* for someone who could be rehabilitated.[22] Thus, Fields' abstract views about rehabilitation had no relevance to his ability to vote for a death sentence. Indeed, the prosecution itself acknowledged the strength of Fields' views by noting on his questionnaire that he had "no reservations" about the death penalty. JL 14.

[22] The prosecution asked Fields whether, if the defendant "indicate[d] to you that he is repentant and has had [a] religious experience or conversion or exposure, at least, if you were to believe him, do you feel that you could ever answer these questions yes . . . [and sentence the defendant to death]?" JA 184-85. Fields answered "yes." *Id.* He explained that regardless of the defendant's capacity for rehabilitation, he would nevertheless vote for death, if warranted, based on the "the way the law has been handed down." JA 185.

The State's professed concern that Fields would not be able to impose the death penalty because of the dictates of his Catholic faith is manifestly disingenuous. Fields knew of, and unequivocally disagreed with, his church's stand on the death penalty. JA 174. Fields' faith, in fact, led him *strongly to support* capital punishment: "According to the Old Testament, people were killed if they violated His law. In its extended service, the State represents Him if the crime has been committed and death is warranted." JA 173-74. Fields then explained that in his view "the State is God's extended person" and "if the State exacts death, then that's what it should be." *Id.* Moreover, the prosecutors accepted at least three non-African-American Catholics for service on petitioner's jury.[23] The prosecutors never even asked any of these non-African-American jurors about their church's views on capital punishment.

Finally, although his brother's criminal record was noted on Fields' questionnaire (JL 13), the State failed even to raise the issue during its examination of Fields. As noted above, the prosecution did not exercise peremptory strikes against any of the four white jurors with similar family circumstances.

Edwin Rand. The State asserted that it struck Rand because of his ambivalence about the death penalty. JA 290. But Rand expressed no greater hesitancy than white jurors Mazza or Hearn. Rand wrote on his juror questionnaire that he supported the death penalty "depending on [the] crime," and that he thought it was "possibly" appropriate for "all murder." JL 30. During voir dire, he confirmed that he thought the death penalty "could be enforced depending upon the crime itself, the circumstances of why someone was killed or could it have been avoided, that type of situation."

[23] Mary Sumrow, a white Catholic, was initially seated as the first juror in the case but later excused on medical grounds. JL 147; JA 508, 615-616. Filemon Zablan, an Asian Catholic, was seated as the tenth juror. JL 218; JA 767. Max O'Dell, a white Catholic, was accepted by the State but struck by the defense. JA 788-789.

JA 262; *see also* JA 263-64 (death penalty should be considered for robbery-murder "because of the murder knowingly. It wasn't a case of, say, self-defense or an accidental type thing"). And although Rand expressed some initial uncertainty about his ability to impose the death penalty, he subsequently confirmed that he could serve on a capital jury. JA 266-68.[24] Rand's support for the death penalty was also clear from his affirmative response to the State's query regarding the appropriate *minimum* punishment for *non-capital* murder: "I think I could still go with the death penalty on that." JA 270. The State itself confirmed Rand's readiness to serve, noting the following on his juror questionnaire: "Could be enforced depending upon circums . . . Murd./Robb. – Type of offense think proper for DP . . . 'Yes' -- I can serve." JL 30.[25]

Wayman Kennedy. As with Rand, the State asserted that it struck Kennedy because of hesitancy about the death penalty. JA 349-50. But Kennedy showed no greater reluctance to consider a death sentence than did white jurors Hearn and Mazza. Kennedy expressed no misgivings about imposing the death penalty in murder-robbery cases like this one. Rather, Kennedy explained that, "if the circumstances around the situation were presented the way that I feel would warrant the death sentence, I would say yeah, but it also depends on the circumstances." JA 324.[26] When asked

[24] The Fifth Circuit noted Rand's comment that the death penalty was a "touchy subject" (JA 11), suggesting that the remark implied unwillingness to vote for a capital sentence But the remark seems better understood as simply a sensible characterization of the state of opinion about the death penalty in our country.

[25] The Fifth Circuit failed to mention any of these statements from Rand's voir dire testimony.

[26] The Fifth Circuit claimed that Kennedy "stated that he believed in the death penalty *only* for mass murders [and] mutilation." JA 12 (emphasis added). Both on his questionnaire and in his voir dire responses, however, Kennedy indicated that mass murder was simply an example of the kind of very serious crime for which he thought a death sentence would be appropriate. *See* JL 46 ("only in extreme cases, *such as* multiple

whether he could give "a yes answer to each of those three [sentencing] questions knowing it would result in the death sentence even though [his] personal feelings were that the man should get a life sentence," Kennedy said that "[i]t would depend on the evidence." JA 324. And he stated that he could answer all the questions affirmatively if he were satisfied that the prosecution had proved its case. JA 325-26.[27]

Roderick Bozeman. To justify striking Bozeman, the State cited his hesitation about the death penalty and his views on rehabilitation. JA 168-69. The record, however, shows that Bozeman favored the death penalty. In his juror questionnaire, he indicated that he supported imposing the death penalty where "the nature of the crime and the circumstances leading up to the crime" warranted it. JL 6. After the prosecution listed the crimes punishable by death in Texas, including murder during a robbery, Bozeman agreed that those were offenses that should make a defendant eligible for the death penalty. JA 150-51. Bozeman was at least as strong a supporter of capital punishment as were white jurors Hearn and Mazza.

Like Hearn, Bozeman stated that he favored the death penalty in cases where there was no way to rehabilitate a person. JA 145-46. But, contrary to the court of appeals' characterization (JA 9), he did not say that such cases were

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murders") (emphasis added); JA 322 ("as I stated briefly on that, mass murder *or something*, yes") (emphasis added).

The Fifth Circuit contended that Kennedy "did not think a murder in the course of a robbery would necessitate the death penalty." JA 12. But, as noted in the text, Kennedy specifically said that some robbery murders warranted a capital sentence. JA 318-19; 323-24.

[27] The Fifth Circuit omitted all these statements from its account of Kennedy's testimony, pulling the sentence, "I think I could" out of context. JA 12. Kennedy immediately added, "It would depend on the evidence." JA 324. Combined with his later clear affirmations that he would answer the special interrogatories in accord with the evidence, regardless of his personal feelings, this statement makes clear that the court of appeals mischaracterized Kennedy's views.

the *only* ones in which he would consider the penalty. And he confirmed that his feelings about rehabilitation would not in any way conflict with his ability to answer the specific questions put to the jury at sentencing. JA 155-56.

Joe Warren. The State claimed it struck Warren because of hesitancy about the death penalty and family members' negative experiences with the law. JA 908-10. But Warren wrote on his juror questionnaire that he believed in the death penalty "[i]n some cases." JL 22; *see also* JA 202 (expressing the view that death penalty might not be appropriate in cases of self-defense). Warren did state that he sometimes felt that if the death penalty is imposed, the condemned person would not really suffer. JA 205-06. But the State accepted white jurors Sandra Jenkins and Kevin Duke, who expressed similar views. JA 542 (Jenkins explaining that "life imprisonment with no parole" was "a harsher treatment" than the death penalty); JA 393-94 (if he had the choice, juror Duke would rather die than be "a useless human being" in prison for the rest of his life).

When explaining why the State struck Warren, the Fifth Circuit stated that he "refused to give a clear answer as to whether or not he could impose the death penalty if the evidence warranted it." JA 14. But the record indicates that Warren provided precisely this clarity on two separate occasions. When the prosecutor explained "three yes answers equal death. Make no mistake about it," and asked Warren "[c]ould you do that," Warren replied "[y]es, I could." JA 207. Later, the prosecutor asked: "Is there any reason why you couldn't answer all three of those questions yes, if we proved that they should be answered yes, knowing that it would result in this man's execution?" and Warren clearly said "[n]o." JA 215-16.

As with juror Fields, although Warren's son's troubles with the law were noted on his questionnaire, the State never even asked Warren about them during its voir dire. *See* JL 20-21. Under questioning from the defense, Warren firmly declared that his relatives' problems would have no effect on his ability to serve. JA 218. Warren is certainly

not distinguished on this basis from Vickery, Davis, Nix, or Weiner—all white jurors accepted by the prosecution.

Carrol Boggess. As with Warren, the State claimed it struck Boggess because of misgivings about the death penalty and a family member with a criminal record. JA 313. But Boggess expressed both support for the death penalty and confidence in her ability to impose it. JA 295-96, 307. Certainly, Boggess expressed no greater concern about the death penalty than white jurors such as Hearn and Mazza. Similarly, the State's professed concern that Boggess had served as a defense witness in a trial involving her nephew is belied both by its failure to mention this during her voir dire and by the numerous white jurors with far greater family—or even personal—connections to criminal proceedings whom the State did not strike.[28]

After reviewing the record, this Court found that "three of the State's proffered race-neutral rationales for striking African-American jurors pertained just as well to some white jurors who were not challenged and who did serve on the jury." JA 37. This circumstance led the Court to hypothesize that these purported race-neutral rationales were "selective and based on racial considerations." JA 38.

[28] With respect to Boggess, the Fifth Circuit stated: "When directly asked whether she could vote for a death sentence, she stated 'I've never been in that situation. I don't feel like I would want to be in that situation and whether I could or not, I'm not real sure.'" JA 12. The court mischaracterizes Boggess' statement, as it was not made in response to a question about the process for imposing the death penalty under the procedure used at the time of petitioner's trial, but rather was a response to a question about the old process where jurors "would go back and actually decide for themselves did the person get the death penalty or should they get a life sentence or should they get [a] number of years . . . [i]f all of them agreed it should be death, they all gave death." JA 298. It was in reference to this discarded process that the prosecutor asked, "[D]o you feel you're the kind of person who could make that kind of decision directly?", and Boggess gave the answer cited by the Fifth Circuit. *Id.* When the actual capital sentencing procedure, which involves answering three statutorily required questions, was explained to Boggess, she said she could answer 'yes' to each one, knowing that such answers would result in a death sentence for the defendant. JA 302.

The Fifth Circuit insisted that the similarities this Court found between the struck African-American jurors and retained white jurors were illusory. But the Fifth Circuit's contentions on this score demonstrably rest on mischaracterizations of the record. Several of those mischaracterizations have been noted above in the descriptions of the African-American venire members. Others occur in the Fifth Circuit's juror comparisons.

The court of appeals claimed that Fields, Bozeman, and Boggess were struck not only because of ambivalence about the death penalty but also because of other characteristics that were unappealing to the prosecution, implying that none of the retained white jurors suffered from more than one defect from the State's point of view. But Hearn not only showed ambivalence about the death penalty; she expressed her belief in the importance of rehabilitation. JA 429. The court of appeals claimed that Warren, Rand, and Kennedy "expressed doubts about whether they personally could impose the death penalty even if the evidence indicated that the death penalty was appropriate" and that "[t]his was not the case with Hearn, Mazza, and Salsini." JA 14. Yet, as demonstrated above, Rand and Kennedy repeatedly made clear that they would vote for death if the evidence supported it.[29]

The court of appeals dismissed the comparability of white venire member Kevin Duke on two grounds, neither of which withstands scrutiny. The Fifth Circuit characterized Duke as having "expressed support for the death penalty"

[29] For Kennedy, *see supra* at 37-38. The prosecutor pressed Rand on precisely this point three times, and Rand answered affirmatively each time. *See* JA 267-68 ("Q: Okay. And you're telling us, that further, if after you've heard all the evidence, the answer to each of those three questions is yes, you can answer those questions yes knowing that the result would be that that man would be executed right down there? A: Yes, I could. Q: You're telling me you can do that? A: Yes.").

and as having said "he could impose it." JA 15. Yet Duke's responses were just the sort of ambivalent statements that earned African-American veniremembers very different characterizations by the Fifth Circuit. Asked whether he believed in the death penalty, Duke answered: "I believe it depends on the circumstances. It's not something to me that has to be done. I have mixed emotions about it because I feel that it really should be up to him whether he wants to die or if he wants to stay in prison the rest of his life if he was guilty, you know." JA 393-94. The State then asked: "What offense do you believe should be punishable by the death penalty, if any?" JA 394. Duke answered with "Murder." But he then added, after another question: "If anything. I wouldn't say that every murder should have the death penalty." *Id.* The Fifth Circuit dismissed Duke's views on rehabilitation as having been expressed "in the context of the availability of parole, not in the context of whether the death penalty was appropriate." JA 15. But there was no reason to think that Duke's strong belief in the rehabilitative potential of all human beings and the importance of "forgiving" those convicted of crimes turned on the category of punishment at issue. Moreover, the Fifth Circuit was simply wrong in claiming that Duke expressed those views only in response to questions about parole. In the context of questions about the death penalty, Duke similarly expressed the view that the commission of a crime, even a very serious one, should not rule out the possibility that a person would act differently in the future. In response to a question about future dangerousness, Duke stated: "there would have to be evidence saying—that I would feel he would do this again or be a threat to society in some *other* way or form. I'm not saying just because I feel that he murdered someone and he was in the process of a robbery and he's guilty of capital murder that he would do it again." JA 396 (emphasis added).

Overall, the Fifth Circuit dismissed the numerous instances and kinds of similarity between African-American jurors whom the prosecution struck and white jurors whom it did not strike by myopically refusing to view any two jurors as comparable unless they shared virtually identical

combinations of attributes, to virtually identical degrees, manifested by virtually identical voir dire colloquies, in every dimension but race. Anything less than precise identity between a stricken black juror and some specific unstricken white juror not only defeated a *Batson* challenge to that strike but also eliminated any probative weight that the strike might have in combination with the striking of 9 (out of 10) *other* black jurors and in combination with the wealth of additional evidence that this Court had already identified as indicative of the potentially pretextual character of the State's purported race-neutral reasons for all of these strikes—*e.g.*, the evidence that the prosecutors were employed and trained in an office long marked by a "culture . . . suffused with bias against African-Americans in jury selection" (JA 41); that they were implicated in acts of discrimination in other cases; that they had racially annotated their juror cards in *this* case; and that they had previously manipulated the jury selection process in *this* case on the basis of race in ways that included a "racially disparate mode of examination" which may itself have produced some of the "divergence in responses" between African-American and white jurors regarding their "reluctance or hesitation to impose capital punishment" (JA 26-27).

Yet, despite this amount of straining to minimize the comparability of the stricken African-American jurors and the unstricken white jurors, the court of appeals could find no distinction between African-American juror Rand, on the one hand, and white jurors Mazza and Hearn, on the other. JA 14.[30] And even one instance of race-based juror exclusion would, of course, violate petitioner's constitutional rights.

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[30] The same was true for the concurring justice the last time this Court considered petitioner's case. *See* JA 47. Even the dissenting justice was forced to concede that there was no basis for distinguishing Rand from Mazza and Hearn. *See* JA 57.

V. THE COURT OF APPEALS FAILED TO ASSESS CRITICALLY THE EXTENT TO WHICH THE STATE TRIAL COURT'S JUDGMENT WAS ENTITLED TO DEFERENCE, AND FAILED TO CONSIDER THE CUMULATIVE WEIGHT OF THE EVIDENCE OF RACIAL DISCRIMINATION.

Running throughout the court of appeals' mishandling of the various categories of petitioner's evidence are two overarching errors of method: (i) a failure to assess critically how shortcomings in the state courts' reasoning undermined the deference to which state-court judgments would otherwise be entitled and (ii) a failure to weigh the evidence of racially discriminatory purpose as a whole. This Court should correct those methodological errors so that other courts will not follow the Fifth Circuit's mistaken lead.

Again and again, the Fifth Circuit refrained from any independent analysis of the state court's finding that the prosecutors' race-neutral reason were genuine. It endorsed the state court's handling of the historical evidence although, as this Court remarked, the state court had not even mentioned that evidence and had inexplicably held that Petitioner failed to establish a prima facie case. JA 42. It dismissed the jury-shuffle evidence because the trial judge had been present during the jury shuffles, although (a) the *Batson* hearing in which the evidence was considered didn't take place until two years later and, "[a]s a result," this Court noted, "was subject to the usual risks of imprecision and distortion from the passage of time" (JA 37); and (b) as this Court also noted, the state trial court "had before it," but did not even acknowledge, a former D.A.'s admission that his office had used jury shuffles to exclude African-Americans on other occasions (JA 40). It adopted the state court's determination that no disparate questioning had occurred (JA 19), although this Court had reached just the opposite conclusion (JA 38). It embraced the state court's comparative juror analysis, although this Court had found that "three of the State's proffered race-neutral rationales for striking African-American jurors pertained just as well to some white jurors who were not challenged" (JA 37), and it "accepted without question the state court's evaluation of

the demeanor of the prosecutors and jurors in petitioner's trial" (JA 36), although this Court had cautioned it not to. Altogether, it treated the state court's finding of no discrimination as making the "credibility of the [prosecutors'] reasons . . . self-evident." JA 9.

On habeas review, federal courts defer to state courts' factual findings. But deference must be informed by an assessment of the reasonableness of the state courts' methods of analysis. Blind acceptance, like that practiced by the Fifth Circuit, sets a precedent for turning deference into "abandonment or abdication of judicial review." JA 35.

The Fifth Circuit also set a dangerous example by examining separately each type of evidence and asking whether it *alone* disproved the State's proffered race-neutral explanations. Considered in isolation, the facts that the prosecutors had been trained to exclude minorities from juries and that one of them had been found guilty of discriminatory jury selection at virtually the same time as Petitioner's trial were not enough to undermine the prosecutors' claims. The prosecutors' jury-shuffle behavior, which can support no other possible explanation than racial exclusion, was not enough by itself to call their reasons into question. That the prosecutors deliberately engaged in two forms of manipulative and racially disparate questioning was not enough by itself to discredit their reasons. And that they struck African-Americans who were no more unfavorable than a number of whites the prosecutors left unchallenged was not enough by itself to undermine their pretensions to evenhandedness.

But the issue, as this Court had already explained, is not whether each piece of evidence considered in isolation suffices to "overcome" (JA 8), the race-neutral reasons given by the prosecution. A single piece of evidence rarely does. The issue is whether the cumulative weight of all the evidence so erodes the prosecution's credibility that the prosecution's reasons become "simply too incredible" to believe. *Hernandez* v. *New York*, 500 U.S. at 369. In this case, that cumulative weight was overwhelming.

VI. THIS COURT SHOULD ORDER THAT HABEAS CORPUS RELIEF BE GRANTED.

The record in this case clearly and convincingly demonstrates that the state trial court acted unreasonably in concluding, on the basis of the evidence before it, that the prosecutors in petitioner's case did not purposefully discriminate on the basis of race. *See* 28 U.S.C. § 2254(d)(2) & (e)(1). The trial court's errors were both methodological and substantive, and they show that the court seriously misapprehended both the nature of the evidence of purposeful discrimination and the relevance of that evidence to the *Batson* inquiry.

As a matter of methodology, the state court erred by failing even to *consider* the extraordinary history of racially motivated prosecutorial misconduct in Dallas County or the prosecutors' systematic abuse of the jury-shuffle process—evidence that "casts doubt on the legitimacy of the motives underlying the State's actions" and which this Court has viewed as arousing "concerns," "suspicio[us]," and "credibility" "erod[ing]." JA 40-42. As a substantive matter, the court's errors include its conclusion that no disparate questioning occurred, that petitioner had failed to make out a prima facie case, and that there were no white jurors similarly situated to the African-American jurors that the prosecutors peremptorily struck. The State has declined even to defend the first two conclusions, and this Court firmly rejected the third (JA 37-38).

If the trial court had considered all the relevant evidence described above and made the appropriate threshold determinations—that disparate questioning *did* occur, that the stricken African-Americans had *not* expressed especially strong opposition to the death penalty—it would have been forced to conclude that no explanation other than racial discrimination can adequately account for the prosecutors' behavior in this case. The fact that the state court took every opportunity to avoid having to engage in that inquiry is perhaps the strongest evidence of all that the state court's conclusions are entirely incorrect. If the facts of this case are

not sufficient to make out a clear and convincing *Batson* violation, it seems unlikely that any set of facts could ever be.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the court of appeals and order that habeas corpus relief be granted to petitioner.

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SEPTEMBER 2004